

MORGAN FARM, INC.

IBLA 94-775

Decided November 3, 1997

Appeal from a Decision of the Assistant Director for Field Operations, Office of Surface Mining Reclamation and Enforcement, declining to take further action in response to citizen's complaint on Permit No. SM-83-385.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State—Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State—Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Upon review of action taken by the state regulatory authority in response to a 10-day notice, OSM is obligated to conduct an inspection unless the state takes appropriate action to cause the violation to be corrected or shows good cause for failure to do so. "Good cause for failure to act" includes a finding that the alleged violation does not exist and the standard on review of such a finding is whether the state regulatory authority's action or response to the 10-day notice is arbitrary, capricious, or an abuse of discretion under the state program. An OSM decision finding that the state regulatory authority had shown good cause for not taking enforcement action in response to a 10-day notice based on a citizen's complaint alleging failure to restore topsoil sufficiently to support postmining use and failure to reclaim the surface to approximate original contour is properly affirmed when the record discloses that inspections failed to identify the asserted violations under the approved state program, the complainant was afforded a hearing before a state administrative law judge regarding the allegations, and the record supports his conclusion that the violations of the state regulatory program were not shown.

APPEARANCES: John Morgan, Frostburg, Maryland, pro se; Sandra M. Lieberman, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Morgan Farm, Inc. (Morgan Farm), has appealed from a January 26, 1994, Decision of the Assistant Director for Field Operations, Office of Surface Mining Reclamation and Enforcement (OSM). The Decision of the Assistant Director on informal review upheld the Harrisburg Field Office August 19, 1993, Decision denying a request for further inspection of property mined by Jones Coal Company in Allegany County, Maryland (Permit No. SM-83-385). See 43 C.F.R. § 842.15.

Morgan Farm is the owner of property in Allegany County, Maryland, which was mined by Jones Coal Company. On April 17, 1992, Morgan Farm filed a citizen's complaint with the Johnstown (Pennsylvania) Area Office, OSM, challenging the Decision of the Maryland Bureau of Mines (MBOM) to release reclamation bonds covering the Jones Coal Company permit alleging three problems on the site. The problems identified by Morgan Farm were that: (1) Jones Coal Company had failed to reclaim the mined land to the approximate original contour (AOC) to the extent Jones Coal Company created hills and depressions where there was level land prior to mining and that this had caused a major runoff problem on the rest of the land; (2) drainage areas were improperly constructed; and (3) while the land had been revegetated there was insufficient topsoil for farming purposes.

In response to the citizen's complaint, Johnstown sent a Ten-Day Notice (TDN) 92-121-147-02 to MBOM, the State regulatory agency responsible for administering the surface coal mining program in Maryland. In its April 29, 1992, response to the TDN, MBOM stated that a bond release inspection had been conducted, and the revegetation was found to meet the standards for release. Further, MBOM indicated that the issues raised by Morgan Farm would be the subject of an adjudicatory hearing scheduled for May 5 and 6, 1992. Due to the pending hearing, MBOM concluded it would be inappropriate to respond further to the TDN at that time. In a May 4, 1992, memorandum to the Director, Harrisburg Field Office, OSM, the Johnstown Area Office Manager recommended that the MBOM response be deemed appropriate. The Director, Harrisburg Field Office informed MBOM on June 3, 1992, that its response to the TDN was deemed appropriate because MBOM had shown good cause for failure to cause the alleged violations to be corrected in that the bond release inspections failed to identify any violations under the approved State program that would preclude

release of the bonds. ^{1/} However, OSM noted that the outcome of the hearing would be monitored to further evaluate the appropriateness of the MBOM response.

The State adjudicatory hearing was held before an administrative law judge in May 1992. It appears from the record that four witnesses testified on behalf of Morgan Farm and it introduced five exhibits. The MBOM had five witnesses and introduced eight exhibits. There were also two joint exhibits. On October 19, 1992, Administrative Law Judge Jeffrey S. Gulin issued his Recommended Decision based on the record at the hearing and posthearing briefs filed by all parties. Judge Gulin found that Morgan Farm had failed to show that MBOM erred in releasing the performance bonds and recommended that the Decision of MBOM be upheld. Morgan Farm filed exceptions to the Recommended Decision with the director of the Maryland Water Resources Administration seeking to alter the Decision. However, after hearing argument, the director issued a final Decision on May 11, 1993, adopting Judge Gulin's Recommended Decision. ^{2/}

On July 28, 1993, Morgan Farm again requested a Federal inspection of Permit No. SM-83-385. As in its earlier request, Morgan Farm alleged the failure to return the mined land to its AOC and to provide sufficient topsoil for farming purposes. It asserted that it was impossible to return the land to a tillable condition because of the lack of upper-level soils and the presence of roots, limbs, large stones, and mine shale in the topmost layers of backfill. Morgan Farm contended that the reclamation as approved by the MBOM doubled the slope of the land in some areas and that the elevation of remaining backfill was such that the elevation was increased. In regard to the claim of insufficient topsoil, Morgan Farm maintained that while the mining permit required 18 inches of topsoil, Federal Soil Conservation Service employees found the topsoil averaged only 6 to 8 inches in depth. Morgan Farm claimed that a local farmer attempted to use a portion of the land for hay but was forced to abandon the effort due to the topsoil condition and the roughness, debris, and steep slopes. It further claimed that MBOM ignored a report by John Morgan (one of the owners of Morgan Farm) that topsoil had been buried. Finally it asserted that reclamation was not conducted in accordance with the mining permit.

On August 19, 1993, the Harrisburg Field Office denied the request for inspection, stating the circumstances described were essentially the same

^{1/} Regardless of that Decision, OSM and MBOM did in fact conduct inspections of the site on May 18, June 8, June 26, and Sept. 10, 1992. They did not note any violations of AOC requirements during these inspections although the State did issue a notice of violation requiring the permittee to repair a pond entry channel and an erosion gully. The remedial work was accomplished and the violation was terminated on June 8, 1992.

^{2/} The bonds were released by MBOM on Aug. 2, 1993, for 6 acres of Phase I, 1 acre of Phase II, and 18 acres of Phase III. (Inspection Report of Dec. 15, 1993.)

as those described in the April 17, 1992, citizen's complaint and that previous inspections had not disclosed any violations regarding failure to restore the site to AOC or redistribute topsoil. Noting that Morgan Farm had not provided any additional information to indicate the existence of a violation, the request for a further inspection was denied.

On September 11, 1993, Morgan Farm filed a request for informal review of the Harrisburg Field Office Decision with the Director of OSM, claiming that MBOM and OSM had ignored requests for a physical review of the site. Morgan Farm reiterated its complaints as expressed in earlier correspondence. A minesite evaluation inspection was conducted by OSM on September 15, 1993, and found compliance, except for a disturbance outside the bonded permit area which was cited. The inspection was conducted with representatives of MBOM, Morgan Farm, and Winner Brothers Coal Company (Winner Brothers) present. ^{3/} The inspection report noted that Winner Brothers had agreed to assist Morgan Farm in filling in a settled area in front of the farm house and another along the highwall interface behind the farm house. Another area Morgan Farm wanted filled in was outside the permit boundary, and the permittee could not work there. It also noted that reclamation on the site had been delayed due to enforcement problems with Jones Coal Company but that Winner Brothers was conducting mining and backfilling operations.

The Assistant Director upheld Harrisburg Field Office's denial of the request on January 26, 1994, basing his decision on the record, as well as a site visit conducted by the Johnstown Area Office Manager on December 15, 1993. This appeal followed.

In the statement of reasons (SOR) for appeal, Morgan Farm requests a full physical review by OSM asserting that previous on-site reviews were based only on information presented by MBOM which Appellant describes as "deceptive, faulty and not fully presented in fact." It maintains that three depressed areas were pointed out to J. Gessinger (Johnstown Office Area Manager) and Peter Hartman (OSM program specialist, Johnstown) during the December 15, 1993, inspection. Morgan Farm also states that "[t]wo other areas mined and unmined display up to 23 foot increase in elevations," (SOR at 1), and contends this represents a swell factor of over 100 percent. Morgan Farm also claims that the soils from one unreleased parcel of land had been moved onto an area that had been released, resulting in a 23-foot depression in the unreleased parcel and an elevation increase on released land that had not been mined. It asserts that test boring would show that topsoil was buried in a mined area and also in an unmined area.

Morgan Farm also asserts that, while the mining permit has a specific requirement of a minimum 18 inches of topsoil to be removed and replaced,

^{3/} Jones Coal Company transferred the permit to Winner Brothers on Aug. 26, 1993.

a subsequent test of topsoil depth by Federal Soil Conservation Service experts found the depth of upper-level soils ranged from 3 to 12 inches. Morgan Farm has submitted a January 9, 1992, letter from the District Manager of the Allegany Soil Conservation District to John Morgan (one of the owners of Morgan Farm) stating that on a November 26, 1991, visit to the farm, upper-level soils of 6 to 8 inches were found. It maintains that Judge Gulin ignored the letter, which was presented as evidence at the hearing. It also claims that during the December 1993, visit by Gessinger, a bucket auger was used to determine the soil depth and found it to be less than 18 inches.

In its response, OSM argues that it properly determined that the State response to the TDN was appropriate and therefore OSM lacked jurisdiction to take further action. It submits that upon receipt of the Morgan Farm's citizen's complaint it issued a TDN to the State, but found that the MBOM had shown good cause for failing to act because State inspections had disclosed no violations.

The OSM argues that the regulatory standard for review of state action by OSM is deferential, and OSM must not substitute its judgment for the state regulatory authority as long as the state's action is not arbitrary, capricious, or an abuse of discretion. Further, OSM asserts it found that MBOM's conclusion regarding the lack of violations was supported by ample evidence including inspections and an adjudicatory hearing at which Judge Gulin considered the entire record and addressed all of Morgan Farm's claims before issuing his decision. The OSM submits that Judge Gulin found the testimony of Morgan Farm's witness as to slope steepness was outweighed by uncontroverted expert testimony that all highwalls and spoil piles had been eliminated and that the general topography of the reclaimed land complimented and blended into the surrounding terrain. Furthermore, OSM contends that due to the inherent subjectivity of the finding that the AOC had been achieved, particular deference is properly accorded to the judgement of the regulatory authority in this area. In support of its position, OSM cites Kenneth Marsh, 82 IBLA 3 (1984), where the Board relied on OSM and state inspection reports to establish that the property was properly restored to AOC, in the absence of specific evidence to the contrary.

Based on the above, OSM contends that it properly found the State response to the TDN to be appropriate and properly deferred to the State's findings. Moreover, OSM asserts that through its own inspections, it confirmed the absence of violations on the site, to the extent that it was possible to do so after the reclamation had been completed. It submits that once it concludes that the state has acted appropriately, it has no jurisdiction to assume enforcement authority.

In reply to OSM's response, Morgan Farm continues to assert that a requirement of the mining permit was a minimum of 18 inches of topsoil and that this was not met. It also maintains that an access road is closed and "the drainage pattern is a disaster causing excessive erosion and pooling of water."

Under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. §§ 1201-1328 (1994), a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so. Harvey Catron, 134 IBLA 244, 255 (1995), aff'd, No. 96-0001-BSG (W.D. VA Mar. 5, 1997), appeal filed, No. 97-1449 (4th Cir. Mar. 28, 1997); Pittsburg & Midway Coal Mining Co. v. OSM, 132 IBLA 59, 72, 102 Interior Dec. 1, 8 (1995).

[1] Under the regulations relating to the TDN procedure, upon receipt of a TDN by the state regulatory authority, the state must take appropriate action or show good cause for not taking action to cause the violation, if any, to be corrected and respond to OSM within 10 days. 30 C.F.R. § 842.11(b)(1)(ii)(B)(1). Under 30 C.F.R. § 842.11(b)(1)(ii)(B)(2), both "appropriate action" and "good cause for failure to act" are to be measured by whether the state regulatory authority's action or response to a TDN is arbitrary, capricious, or an abuse of discretion under the state program. Pittsburg & Midway Coal Mining Co. v. OSM, 132 IBLA at 72, 74, 75-77, 102 Interior Dec. at 8-10 (1995).

"Appropriate action" is defined as "enforcement or other action authorized under the State program to cause the violation to be corrected." 30 C.F.R. § 842.11(b)(1)(ii)(B)(3). Regulation 30 C.F.R. § 842.11(b)(1)(ii)(B)(4) "lists five situations that will be considered 'good cause' for the state regulatory authority to fail to take action to have a violation corrected." 53 Fed. Reg. 26735 (July 14, 1988). A state may have good cause for failing to act on a TDN if, among other things: "(i) Under the State program, the possible violation does not exist; (ii) the State regulatory authority requires a reasonable and specified additional time to determine whether a violation of the State program does exist; * * *." 30 C.F.R. § 842.11(b)(1)(ii)(B)(4). Thus, by regulation, the Department has announced that it will not substitute its judgment for that of the state regulatory authority, except where OSM concludes that the response to the TDN was arbitrary, capricious, or an abuse of discretion. Harvey Catron, 134 IBLA at 255-56.

In this matter, OSM has declined to substitute its judgement for that of MBOM and concluded that MBOM's actions were not arbitrary, capricious, or an abuse of discretion. A party objecting to an OSM decision not to enforce SMCRA in the face of a "citizen's complaint" by that party has the burden of proving that OSM acted in error. William H. Pullen, Jr., 132 IBLA 224, 228 (1995); Peter J. Rosati, 119 IBLA 219, 224 (1991). Thus, Morgan Farm's burden is to establish that OSM erred in its finding of good cause. To do so, it must show that MBOM's response to the TDN was arbitrary, capricious, or an abuse of discretion. Harvey Catron, 134 IBLA at 257; Ronald Maynard, 130 IBLA 260, 266 (1994). Where Appellant has raised objections to the Assistant Director's Decision on informal review, our task is to determine if there is basis in the record to support OSM's

conclusions, and if so, whether Appellant has established that the Assistant Director erred in reaching the conclusion that he reached. Harvey Catron, supra.

Morgan Farm had requested a Federal inspection to assess the postmining condition of its property in comparison to the premining condition. Appellant's concerns included insufficient topsoil, steep slopes, and debris. The Assistant Director rejected Morgan Farm's request based on the case record and a site visit by the Johnstown Area Office Manager. A major part of the record is the Decision by the State administrative law judge which was adopted by the Director, Water Resources, Maryland Department of Natural Resources. The Board has held that while a state hearing officer's decision is not per se evidence of good cause for failure of the state agency to take action, OSM must review the state adjudicatory findings under the deferential standard set forth in 30 C.F.R. § 842.11(b)(1)(ii)(B)(2). See Pittsburg & Midway Coal Mining Co. v. OSM, 132 IBLA at 80-81, 102 Interior Dec. at 12. The state hearing officer's decision must have a proper basis in the state program, for without such basis, any ruling would be arbitrary and capricious. Id.

Thus, we look to Judge Gulin's Decision in this matter to determine if it is supported in the record. The allegations Morgan Farm made before Judge Gulin are the same ones raised in the appeal to the Assistant Director. The first concerned Morgan Farm's assertion that the coal operator failed to properly restore the topsoil thereby rendering the property unsuitable for the intended postmining use of farming. The other allegation was that the operator failed to restore the permitted property to "approximate original contour." Judge Gulin rejected both allegations and held in his Decision that the Decision by MBOM to release the performance bonds should be upheld.

Review of the record before us including the Decision of the administrative law judge discloses that one of the joint exhibits considered by Judge Gulin was a "Consent of Landowner Right of Entry" form which was submitted as part of the permit application and which indicated the permitted area was to be returned to "grasses for farming purposes." ^{4/} The administrative law judge found that exhibit 5 from Morgan Farm, included in the permit application, indicated that the postmining use planned by the owner was "to grow hay for 5 years until bonds are released, then incorporate corn and oats later." (Administrative Law Judge Decision at 3.) The permit required the permittee to remove, segregate, and stockpile 18 inches of topsoil prior to mining and after mining to evenly redistribute the topsoil. Id. at 3-4.

^{4/} The exhibits themselves are not part of the case record before the Board. However, Morgan Farm has not challenged Judge Gulin's characterization of the exhibits.

In support of its allegations of failure to properly remove, store, and redistribute 18 inches of topsoil in accordance with the approved reclamation plan, the administrative law judge found Morgan Farm relied in part upon the testimony of Nathan Workman, a former tenant farmer who farmed a portion of the released parcels. However, Judge Gulin observed that, while Workman testified that the parcels were not currently profitable to farm, the evidence also revealed that in recent history the crop production on that land reflected what Judge Gulin termed a very marginal operation. Id. at 5-6. Judge Gulin found that Workman had previously relinquished his year-to-year tenancy because he required a longer term lease to justify the costs of liming and fertilization necessary to produce profitable crops. Id. at 6. The administrative law judge also found that some additional management is generally anticipated after a mining operation because some mixing of the topsoil with the underlying layer is unavoidable. Id.

Judge Gulin concluded, based on inspections by MBOM and OSM, as well as soil sample tests of the released parcels, that the 18 inches of topsoil had been removed, stored, and redistributed as required. Id. at 4. He found that the uncontroverted testimony by the MBOM inspectors revealed that the topsoil had been entirely removed, stored, and redistributed. Id. at 6. He also found that soil testing reflected no appreciable difference in topsoil quality between samples of the released parcels and undisturbed nonmined parcels. Id. He then concluded that with appropriate management, including nutrient addition, the parcels were suitable for growing hay for several years and ultimately for growing corn and oats. Id. at 4.

The other complaint addressed in Judge Gulin's Decision was the assertion that the permittee failed to properly backfill, regrade, and restore the topography to AOC. Noting that Maryland's definition of AOC varied little from that found in SMCRA, 30 U.S.C. § 1291(2) (1994), Judge Gulin looked at an excerpt from the legislative history which noted the impossibility of restoring the precise original contour and an implementing directive issued by OSM in 1987 entitled "Approximate Original Contour" which noted that AOC determinations necessarily involve a certain amount of subjective judgment on the part of the regulatory authority which should be given substantial deference in the absence of an abuse of discretion.

Judge Gulin also noted that decisions of this Board have emphasized the need to consider the overall changes in the slope rather than changes in specific areas. In particular, Judge Gulin cited Peter J. Rosati, 119 IBLA 219 (1991), where the Board affirmed OSM's conclusion that changes in slope were within acceptable limits even though the slope of the land in one section of the mined area went from a slope of between 8 to 10.82 percent before mining to between 18.37 to 19.8 percent after reclamation, which was a significantly greater steepness than alleged by Morgan Farm.

Judge Gulin also recognized that there was testimony on behalf of Morgan Farm by an expert in the field of cartography, but noted that the

expert merely testified that at a few isolated sites, the slope steepness had been increased by as much as 50 percent. However, Judge Gulin found that the "uncontroverted expert testimony indicated that all highwalls and spoil piles had been eliminated, adequate drainage attained, and the general topography of the reclaimed land compliments and blends into the surrounding terrain." (Administrative Law Judge Decision at 11-12.) Therefore, he concluded that the expert testimony at the hearing showed that AOC had been achieved.

Judge Gulin's Decision shows that he analyzed the relevant factual and legal factors. That Decision coupled with the site visits by the Johnstown Area Office Manager and OSM program specialists and their finding of no violations provide a rational basis for the Assistant Director's Decision that the MBOM response to the TDN was appropriate and no further inspection by OSM was justified.

Reviewing Appellant's submissions on appeal, we are unable to conclude that it has sustained the burden of establishing error in the OSM Decision. Morgan Farm argues that the topsoil is inadequate and will not support the postmining use of farming. In support of its contention, it has supplied a copy of a January 9, 1992, letter from the District Manager of the Allegany Soil Conservation District reporting on a visit to the farm on November 26, 1991. While the findings reported in the letter noted an average depth of 6 to 8 inches of topsoil material, it also recognized the "good" quality of the topsoil, i.e., "dark brown in color with few stones." The soil characteristics of the reclaimed lands were found to be capable of supporting permanent vegetation, although not as productive in terms of crop yields as natural areas of the same type of soil. We find that this is not inconsistent with Judge Gulin's conclusion that the evidence showed that the land was suitable for hay and ultimately for corn and oats with proper management. ^{5/}

While Morgan Farm has made allegations that the land was not reclaimed to AOC, it has provided no proof that the land was not properly reclaimed. The Department has not required that the land be reclaimed to precise premining contours, only that the general configuration of the terrain following reclamation be "comparable" to the premining terrain. See William H. Pullen, 132 IBLA at 230-31. Morgan Farm has failed to show that there were substantial deviations between premining and postmining contours. In its SOR, Morgan Farm asserts that it pointed out three depressed areas to OSM

^{5/} Morgan Farm has also supplied a backfilling and planting report received by the MBOM on Oct. 30, 1986, which stated that the approximate thickness of the topsoil spread on the regraded areas was 12 inches. However, this report was for land to be released by MBOM which, according to Morgan Farm was not, due to the objections of John Morgan. Such a document does not provide any support for the parcels at issue here.

employees Gessinger and Hartman during the December 15, 1993, on-site inspection. However, the report of that inspection found the AOC to be in compliance and there is nothing in the record to contradict that, other than Morgan Farm's assertion. The record does include a site-inspection report from September 15, 1993, that noted that permittee Winner Brothers had agreed to assist Morgan Farm in filling in a settled area, but the report also found the site to be in compliance with AOC. There has been no showing that there were truly substantial deviations between premining and postmining contours.

In its reply to the OSM response, Morgan Farm states that an access road is closed and the drainage pattern is a disaster causing excessive erosion and pooling of water. These claims have not been made before. Moreover, no proof of this has been provided. No requirement is found in SMCRA or its implementing regulations that drainage patterns shall be unchanged following reclamation. Indeed, some changes are to be expected when reclaiming to AOC which may embrace some alteration of the original premining contour. William H. Pullen, 132 IBLA at 232.

Therefore, we conclude that the Assistant Director properly affirmed the Decision of the Harrisburg Field Office declining to undertake any further Federal inspection and enforcement action in response to Appellant's citizen's complaint. Under the arbitrary and capricious standard, we find that the record supports the MBOM determination.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge

